STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2011
v	No. 296050 Wayne Circuit Court
KYLE J. AMES DONAHEE, a/k/a KYLE JAMES DONAHEE, Defendant-Appellant.	LC No. 09-021522-FH

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ

PER CURIAM.

Defendant was convicted by a jury of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), for which he was sentenced to concurrent prison terms of 7 to 15 years for each conviction. He appeals by right. We affirm.

Defendant's sole claim on appeal is that the trial court erred in denying his motion to suppress his confession. He contends the confession was involuntary and obtained in violation of his right to counsel. In reviewing a trial court's determination on a motion to suppress, this Court reviews the record de novo but will defer to the trial court's factual findings unless they are clearly erroneous. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003).

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). The burden is on the prosecution to prove a valid waiver of rights by a preponderance of the evidence. *People v Cheatham*, 453 Mich 1, 27; 551 NW2d 355 (1996).

Whether a confession is voluntary is determined by examining the conduct of the police. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Unless there was police coercion or misconduct, in obtaining a confession, it will be deemed voluntary. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been

overborne and his capacity for self-determination critically impaired." *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997).

Relevant factors in determining voluntariness include the defendant's age, the defendant's education or intelligence level, the extent of the defendant's previous experience with the police, whether the defendant was subjected to repeated and prolonged questioning, whether the defendant was advised of his constitutional rights, whether there was an unnecessary delay in bringing the defendant before a magistrate before he made his statement, whether the defendant was injured, intoxicated, drugged, or in ill health when he made the statement, whether the defendant was deprived of food, sleep, or medical attention, and whether the defendant was physically abused or threatened with abuse. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Also, whether the defendant was promised leniency in exchange for a confession is another factor to be considered. *Shipley*, 256 Mich App at 373. "No single factor is determinative." *Tierney*, 266 Mich App at 708. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that the statement was freely and voluntarily made." *Cipriano*, 431 Mich at 334.

A defendant who is in custody and who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the [defendant] himself initiates further communication, exchanges, or conversations with the police." *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). And a defendant's unequivocal invocation of his right to remain silent must be scrupulously honored. *People v Catey*, 135 Mich App 714, 722-726; 356 NW2d 241 (1984). But when a defendant makes only an ambiguous or equivocal reference to an attorney, questioning may continue. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). In other words, the invocation of a defendant's right to counsel requires a statement that can "reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994). If the defendant makes an ambiguous reference to an attorney "that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," the officer need not cease his interrogation. *Id*. (emphasis in original).

In this case, the officer in charge, Kenneth Kapanowski, questioned defendant. There is no dispute that defendant was subjected to custodial interrogation: he was questioned after having been arrested and booked into the jail. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Defendant was advised of his rights and admittedly waived them during the initial interrogation. He denied wrongdoing, and the interview was suspended. Kapanowski was not required to re-advise defendant of his rights before the second interview, which began less than an hour after the first one ended. *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986). Kapanowski reminded defendant that his rights were still in effect, and defendant stated that he understood them. At one point, defendant said, "I think this is where I need an attorney." This reference to counsel was equivocal. *Clark v Murphy*, 331 F3d 1062, 1069-1072 (CA 9, 2003) ("I think I would like to talk to a lawyer" is equivocal); *Burket v Angelone*, 208 F3d 172, 198 (CA 4, 2000) ("I think I need a lawyer" is equivocal). At that point, Kapanowski told defendant that questioning would have to cease unless defendant reinitiated the conversation and defendant chose to proceed without counsel. Under the circumstances, the continued questioning was not improper.

There was no evidence that defendant was abused or threatened with abuse, denied food, drink, sleep, bathroom privileges, or medical attention. Kapanowski apparently said something to defendant about the sexual encounters being consensual because the victim admitted to voluntarily engaging in sexual relations with defendant. But Kapanowski never said that because the encounters were consensual, no crime occurred. Rather, defendant assumed that he committed no crime. Defendant further testified that Kapanowski said something about going home if he made a statement. But, Kapanowski denied telling defendant he would be able to go home, and defendant never claimed that Kapanowski told him that the statement had to include an admission to having sexual relations with the victim. Rather, defendant only admitted as much because he thought that was what Kapanowski wanted to hear. Under the totality of the circumstances, the defendant's statement was voluntary and was not obtained in violation of his right to counsel. Accordingly, the trial court did not err in denying defendant's motion to suppress the statement.

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Karen M. Fort Hood